

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

HERMAN J. TROTSKY,

Plaintiff,

v.

THE TRAVELERS INDEMNITY  
COMPANY and UNITED STATES  
FIDELITY AND GUARANTY COMPANY,

Defendants.

Case No. 2:11-cv-02144

DEFENDANT USF&G'S REPLY IN  
SUPPORT OF MOTION TO QUASH OR  
FOR PROTECTIVE ORDER RE:  
PLAINTIFF'S MULTIPLE RULE 30(b)(6)  
DEPOSITIONS

**NOTE FOR MOTION: FRIDAY,  
JANUARY 25, 2013**

Defendant could take the time to address all of the factual inaccuracies raised by plaintiff in opposition to this motion, but most of his factual arguments are not relevant to whether or not plaintiff has met his burden to establish the need for three 30(b)(6) depositions, addressing all of these points now would not be an efficient use of the court's time, and we only have six pages to reply. The truth is the parties have worked together in good faith throughout this case in an attempt to move the case forward in a reasonable manner despite having to deal with a series of unfortunate events, including medical issues on both sides (plaintiff has recently informed defendant that Mr. and Mrs. Trotsky are currently unable to be deposed due to Mr. Trotsky's current medical condition.) The parties now disagree on how many 30(b)(6) depositions of USF&G plaintiff should be allowed to take under the rules and whose burden it is to establish

DEFENDANT USF&G'S REPLY - 1

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1 that more than two days is necessary. Plaintiff complains that he only used approximately four  
2 hours on the first day; but that was his choice. USF&G has now presented its witness for two  
3 full days and should not be required to submit to the inconvenience and expense of an additional  
4 day because plaintiff chose to use only half of the first day. Despite the strength of its position,  
5 at the end of yesterday's deposition, defendant's counsel invited plaintiff's counsel to send an e-  
6 mail outlining what he believes he still needs to address by way of a 30(b)(6) deposition, and  
7 defendant will consider plaintiff's proposal.

8 In asserting his right to multiple 30(b)(6) depositions, plaintiff conveniently skips  
9 consideration of the dictate in Rule 26(a)(2)(B) that leave of the court "must" be obtained by the  
10 party seeking to depose a single person for more than 7 hours.<sup>1</sup> As stated in *In re Sulfuric Acid*  
11 *Antitrust Litig.*, 2005 WL 1994105, at \*2 (N.D. Ill. Aug. 19, 2005):

13 Of course, the Rule directs that leave to take a successive deposition  
14 "shall" be granted, but only if the court -- **not an inevitably self-**  
15 **interested party** -- determines that the requested discovery is "consistent  
with the principles stated in Rule 26(b)(2)" . . .

16 . . . [T]he fact that a party may ultimately be able to persuade a judge to  
17 allow successive depositions has absolutely nothing to do with the  
18 obligation to seek in the first instance a court's permission to take a  
deposition of a "person" who has once been deposed.

19 (Bold emphasis added.) Plaintiff has not met its burden to prove the third deposition is necessary.

20 The unreasonably cumulative and duplicative nature of plaintiff's multiple depositions is  
21 illustrated by the subjects covered by the first Rule 30(b)(6) deposition taken in this case. This  
22 deposition addressed the completeness of USF&G's answers and responses to plaintiff's prior  
23 written discovery, which addressed, among other things, the following topics:

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24  
25 <sup>1</sup> Defendant notes that it mistakenly stated in its Motion that its written objections to the 30(b)(6)  
26 depositions referenced a subpart of Rule 30, 30(a)(2)(A)(ii). It did not.

1 **INTERROGATORY NO. 1:** Describe in detail each and every step taken by  
You or anyone on your behalf to investigate the Claim.

2 **INTERROGATORY NO. 2:** Describe in detail each and every step taken by  
3 You or anyone on your behalf to comply with your obligations under WAC 284-  
30-920 regarding any of the Policies.

4 **INTERROGATORY NO. 3:** Identify any and all persons likely to have  
5 discoverable information regarding the investigation of the Claim.

6 **INTERROGATORY NO. 4:** Identify any and all persons likely to have  
7 discoverable information regarding your search for the Policies.<sup>2</sup>

8 USF&G submits that the topics covered in the first Rule 30(b)(6) deposition substantially  
9 cover the issues relevant to plaintiff in this case. *Compare* Exhibit A to the Rumsey Dec. dated  
10 January 17, 2013, *with* Exhibits A-D to the Supp. Rumsey Dec. Plaintiff's counsel admit to  
11 taking slightly less than 4 hours to cover these topics. Considering how plaintiff's second Rule  
12 30(b)(6) deposition is on the topic of the lost policies, and the third is on the topic of claims  
13 handling and investigation, if it takes less than 4 hours to take one Rule 30(b)(6) deposition on  
14 substantially all of these issues in the first place, 7 hours more as offered by USF&G for **one**  
15 additional Rule 30(b)(6) deposition should be sufficient.<sup>3</sup>

16 In order for plaintiff to justify additional deposition time, he bears the burden of proving  
17 the discovery already conducted is insufficient, and that an extra deposition is not cumulative.

18  
19 <sup>2</sup> See defendant's responses to plaintiff's various discovery requests, attached as Exhibits  
20 A-D to the Supplemental Declaration of T. Arlen Rumsey submitted with this Reply ("Supp.  
21 Rumsey Dec.").

22  
23 <sup>3</sup> Defendant notes that Plaintiff's Opposition to Defendant USF&G's Motion to Quash was not  
24 filed until 11:59 p.m. on Wednesday, January 23, 2013, literally the last possible minute. However, the  
25 supporting declarations to plaintiff's opposition brief are time-stamped a few minutes later during the  
26 early minutes of Thursday, January 24, 2013, and thus untimely filed pursuant to CR 7(d)(2) ("any papers  
opposing motions of the type described in this subsection shall be filed and received by the moving party  
no later than the Wednesday before the noting date.").

DEFENDANT USF&G'S REPLY - 3

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1 In a far more complex case filed by an insurer against health care providers, the district court in  
2 *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 254 F.R.D. 227, 235 (E.D. Pa. 2008)  
3 denied the health care providers' attempt to depose the insurer's corporate representative for  
4 Days 3 & 4. The court in *New Horizont* rejected the *Quality Aero* and *Kimberly-Clark* decisions  
5 relied upon by plaintiff Trotsky, noting:

6 . . . The policy against permitting a second deposition of an already-  
7 deposed deponent is equally applicable to depositions of individuals and  
8 organizations. Taking serial depositions of a single corporation may be as  
9 costly and burdensome, if not more so, as serial depositions of an  
10 individual. In both cases, each new deposition requires the deponent to  
11 spend time preparing for the deposition, traveling to the deposition, and  
12 providing testimony. In addition, allowing for serial depositions, whether  
13 of an individual or organization, provides the deposing party with an  
14 unfair strategic advantage, offering it multiple bites at the apple, each time  
15 with better information than the last. . . .

16 . . .  
17 Defense counsel provides *no* reason, let alone a good reason, why the  
18 questions relating to State Farm's non-fraud claims were not noticed at the  
19 previous two Rule 30(b)(6) depositions; Defendants simply chose to  
20 proceed in such a manner. However, the Federal Rules do not contemplate  
21 the "wait-and-see" approach to discovery taken by Defendants. Such an  
22 idiosyncratic approach would permit Defendants, without having  
23 demonstrated any good cause for doing so, to avoid drafting a  
24 comprehensive notice of deposition and instead conduct depositions  
25 seriatim, thereby shifting costs to the opposing side, which would be  
26 forced to expend resources preparing for several Rule 30(b)(6)  
depositions, instead of one.

19 *New Horizont*, 254 F.R.D. at 235; *See also, Ast v. BNSF Railway Co.*, No. 09-2519-EFM/DWB,  
20 2011 WL 5080256, at \*2 (D. Kan. Oct. 25, 2011) (denying defendant's motion for leave to  
21 depose plaintiff a second time), *quoting Smith v. Sec. of New Mexico Dept. of Corr.*, 50 F.3d 801,  
22 829 (10<sup>th</sup> Cir. 1995). Plaintiff is seeking to indulge in exactly the serial Rule 30(b)(6) strategy  
23 soundly rejected in *New Horizont*.

1 While, as stated above, addressing all of the factual inaccuracies would be an inefficient  
2 use of the Court's time, defendant feels compelled to address some key examples of how plaintiff  
3 has skewed the facts in his favor:

4 1. Plaintiff states defendant did not respond to his November 27, 2012 letter regarding  
5 his alleged right to take three 30(b)(6) depositions until defendant served its December 7, 2012  
6 objections. This statement is deceptive because defendant had already clearly stated in a  
7 November 13, 2013 letter, attached as Exhibit O to plaintiff's counsel Lawrence Locker's  
8 declaration, that it would not be producing a witness for the three depositions and requested that  
9 new notices be issued that complied with Rule 30. Plaintiff later re-issued the same three  
10 notices. In phone conversations with plaintiff's counsel, defendant's counsel agreed to  
11 compromise and hold a second deposition, but never agreed to a third.

12 2. Plaintiff claims USF&G has failed to investigate his claim. Plaintiff knows this is  
13 incorrect. From the claim file produced and the first 30(b)(6) deposition, plaintiff knows  
14 defendant conducted a comprehensive search of its files and has been unable to locate the alleged  
15 liability policies, verify their issuance, or determine their material terms. These policies were  
16 allegedly issued over 30 years ago. Defendant also requested and has reviewed all material  
17 provided by plaintiff relevant to the underlying claim against plaintiff. Plaintiff has not  
18 presented any witness that can verify the blank policy forms he claims represent the material  
19 terms of the alleged policies contain the actual terms. Nor has plaintiff presented any evidence  
20 that would establish the terms of any endorsements that likely would have been a part of any  
21 alleged policy. Washington law requires that plaintiff prove, by clear, cogent, and convincing  
22 evidence, the terms of the lost contracts he seeks to enforce. He has not done so. *See Lutz v.*  
23 *Gatlin*, 22 Wn. App. 424, 590 P.2d 359 (1979).  
24  
25  
26

DEFENDANT USF&G'S REPLY - 5

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1 3. Plaintiff claims defendant's 30(b)(6) witness was not prepared. He was. The witness  
2 was not able to answer every detailed question, but the 175 page transcript belies the claim that  
3 he was not prepared.

4 4. Plaintiff claims defendant has refused to provide substantive responses to discovery  
5 requests and identify witnesses. That is not correct, as this court can see from Exhibits A-D to  
6 the Supp. Rumsey Dec. Among other things, pursuant to Rule 33(d), defendant produced the  
7 non-protected, relevant portions of its claim file, which provided a substantive response to the  
8 discovery requests and identified the persons with knowledge of this claim.  
9

10 Both sides have experienced a series of unfortunate events which have complicated the  
11 deposition process. Nonetheless, the basic facts on USF&G's side are straightforward – it made  
12 an unsuccessful comprehensive search for the alleged liability policies, and was unable, during  
13 its investigation, to make a determination of coverage because the alleged policy terms had not,  
14 and still have not been established – the burden for which is on plaintiff. The two days spent on  
15 30(b)(6) depositions should have been sufficient. It is plaintiff's burden to prove otherwise; a  
16 burden he has not met.  
17

18 DATED this 28<sup>th</sup> day of January, 2013.

19 GORDON & POLSCER, L.L.C.

20 By: T. Arlen Rumsey

21 T. Arlen Rumsey, WSBA No. 19048  
22 Attorneys for The Travelers Indemnity  
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24 Guaranty Company, Defendants  
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1 **CERTIFICATE OF SERVICE**

2 I, Lynne M. Overlie, hereby certify that on January 25, 2013, I electronically filed this  
3 Notice of Removal with the Court using the CM/ECF system which will send notification of  
4 such filing to the following:

5 ***Counsel for Plaintiff Herman J. Trotsky***

6 Lawrence C. Locker, WSBA #15819  
7 Summit Law Group PLLC  
8 315 Fifth Avenue S Suite 1000  
9 Seattle, WA 98104-2682  
10 Phone: 206-676-7000  
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☐ UPS  
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12 I declare under penalty of perjury under the laws of the State of Washington that the  
13 foregoing is true and correct.

14 DATED this 25 day of January, 2013.

15   
16 Lynne M. Overlie, Legal Assistant